

95 FMSR 5442

**Jerry Taylor v. Department of the
Treasury**

U.S. Merit Systems Protection Board
SF-0831-95-0461-I-1(12/07/95); 68 MSPR
693

December 7, 1995

Judge / Administrative Officer

**Before: Erdreich, Chairman; Slavet, Vice Chair;
Amador, Member**

Related Index Numbers

**8.0481 Evidence, Quantum of Proof,
Preponderance of Evidence**

91.009 Retirement, Service Credit

91.018 Retirement, Effect of Federal Laws

91.048 Retirement, Statutory Construction

**1022.047 Special Employment Categories, Law
Enforcement Officers**

Case Summary

The appellant proved by preponderant evidence that he was entitled to law enforcement officer service credit for retirement purposes.

The appellant proved by preponderant evidence that his duties entitled him to law enforcement officer (LEO) service credit for retirement purposes. The appellant was employed as a GS-13 Explosives Enforcement Office and requested LEO service credit for retirement purposes under the Civil Service Retirement System. The agency denied his request. After affording the appellant his requested hearing, the AJ reversed the agency's action. In its petition for review, the agency argued that the AJ erroneously interpreted the definition of "law enforcement officer" under 5 USC 8331(20) and further erred in finding that the appellant's primary duties supported the LEO status. In determining whether an employee's duties primarily involve criminal investigations, the Board considered whether the employee's work involved unusual physical hazards, long stretches of overtime, on-call 24 hours a day, the carrying of weapons,

frequent contact with suspected or known criminals, and/or the giving of Miranda warnings to witnesses. From the documentary and testimonial evidence, the Board found that the appellant proved by preponderant evidence that the duties of his position involved many of the LEO duties. Consequently, the Board found that he was entitled to LEO service credit.

Full Text

APPEARANCES:

Paul J. Augustine, Esquire, Skinner, Fawcett & Mauk, Boise, Idaho, for the appellant.

Anthony N. Torres, Esquire, Washington, D.C., for the agency.

Opinion and Order

The Agency has timely petitioned for review of an initial decision that reversed the agency's determination that the appellant is not entitled to law enforcement officer (LEO) service credit. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still REVERSING the agency's action.

Background

The appellant, a GS-1801-13 Explosives Enforcement Officer, petitioned for appeal from the agency's action denying him LEO service credit for retirement purposes under the Civil Service Retirement System. Initial Appeal File (IAF), Tab 1 and Tab 4, Subtabs C, E. The administrative judge, after affording the appellant his requested hearing, reversed the agency's determination, finding that the appellant had shown by preponderant evidence that the primary duties of his position entitled him to LEO service credit.* IAF, Tab 6.

On petition for review, the agency argues that the administrative judge erroneously interpreted 5 U.S.C. § 8331(20), the definition of "law enforcement

officer," and further erred in finding that the duties that support LEO status were the appellant's primary duties. Petition For Review File (PFRF), Tab 1. The appellant has timely responded in opposition to the petition for review. PFRF, Tab 3. Along with his response, the appellant has included several documents that are a part of the record below and a letter of commendation that he has submitted for the first time on petition for review with no showing that it was unavailable before the record closed below despite his due diligence. Thus, the Board will not consider it. 5 C.F.R. § 1201.115; *Avansino v. U.S. Postal Service* [81 FMSR 5601].

Analysis

Under 5 U.S.C. § 8336(c), an employee is entitled to preferential retirement credit for service as a "law enforcement officer." A "law enforcement officer" is "an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States." 5 U.S.C. § 8331(20); *Hobbs v. Office of Personnel Management* [93 FMSR 5344]. In determining whether an employee's duties primarily involve criminal investigation, the Board considers whether the employee's work involves unusual physical hazards, long stretches of overtime, on-call status 24 hours a day, the carrying of weapons, frequent contact with suspected or known criminals, and/or the giving of Miranda warnings to witnesses whom he interviewed in the course of his investigation. *Sauser v. Office of Personnel Management* [93 FMSR 5424]; *Hobbs [supra]*. The appellant bears the burden of proof of his entitlement to LEO service credit by a preponderance of the evidence. *Taylor v. Office of Personnel Management* [93 FMSR 5442]. The appellant must support his claim of entitlement with evidence describing the actual primary duties of his position as well as corroborating evidence. See *Little v. Office of Personnel Management*, 762 F.2d 962, 964 (Fed. Cir. 1985) [85 FMSR 7039]. The duties actually performed and not only the official position

description determine LEO retirement credit eligibility. See *Felzien v. Office of Personnel Management*, 930 F.2d 898, 903 (Fed. Cir. 1991) [91 FMSR 7009].

The record contains documentary evidence in the form of position descriptions, performance appraisals, reports, and commendations that the appellant submitted to the agency in support of his request for LEO status. IAF, Tab 4. The appellant also offered testimonial evidence at the hearing in support of his arguments. IAF, Volume 4. The documentation and witnesses showed that the appellant's duties include investigating crime scenes, collecting evidence, interviewing witnesses and suspects, preparing and executing search warrants, rendering explosive and incendiary devices safe, and testifying at criminal trials. Initial Decision (I.D.) at 3-7. As the administrative judge noted, the appellant's position description stated that the position involved physical exertion and "extremely hazardous situations." IAF, Tab 4, Subtab F2; I.D. at 3, 6. The administrative judge found that the appellant works long hours, including overtime, and is on-call. I.D. at 8. The record shows that the agency approved the appellant for administratively uncontrollable overtime. IAF, Tab 4, Subtab G. The record also indicates that the appellant works at all times of the night and day and has travelled to distant crime sites on short notice. IAF, Tab 4, Subtabs F4-F34. The appellant testified that at times he carries a weapon but that his position is not one where the employee is ordinarily authorized to carry a weapon. I.D. at 4 n.4, 6. Additionally, the appellant testified that he has given suspects their Miranda warnings, but acknowledged that a Special Agent in Charge was always present on those occasions. I.D. at 4 n.2.

The agency submitted evidence in the form of testimony that the appellant does not apprehend or detain suspects, that he provides technical assistance to Special Agents in investigations, and he is not authorized to carry a weapon and should not be in a situation where a firearm is necessary. I.D. at 5-6.

The administrative judge concluded, and we

agree, that the appellant met his burden of proving by preponderant evidence that the duties of his position were primarily the investigation of individuals suspected or convicted of offenses against the criminal laws of the United States. I.D. at 9. As the administrative judge found, the fact that the appellant did not also apprehend or detain suspects did not disqualify him from LEO status. I.D. at 7; *see also Galuppo v. Office of Personnel Management* [88 FMSR 5330] (LEO retirement credit was granted based on the employee's involvement primarily in the investigation of criminal activities). The administrative judge correctly rejected the agency's argument, reiterated on petition for review, that the appellant did not investigate "individuals" as required by 5 U.S.C. § 8331(20) and 5 C.F.R. § 831.902, but only criminal acts, finding that there was no distinction between investigating the individual and the acts of individuals. I.D. at 8. Moreover, while the appellant's investigative work often takes place before a suspect is identified, the record shows that he also participates in the investigation of individuals when he interviews suspects to compare their statements with the physical evidence that he gathered, gives Miranda warnings to individuals, and participates in the execution of search warrants on the property of identified suspects. We find that the record shows that the appellant investigates individuals within the meaning of 5 U.S.C. § 8331(20).

We further find that the administrative judge's conclusion is consistent with the Board's analysis of the legislative history of the LEO provisions in previous cases. These preferential retirement provisions were enacted to make the federal law enforcement corps a career service composed of young men and women capable of meeting the stringent physical requirements of law enforcement positions and performing at peak efficiency. *Ferrier v. Office of Personnel Management* [95 FMSR 5025]. In *Hobbs [supra]*, the Board considered whether the existence or degree of hazard associated with the position should be a factor in the determination of LEO status. The Board found that stringent physical

requirements were an appropriate factor and that the hazardous nature of criminal investigations, because of frequent contact with criminals and suspected criminals attempting to evade capture, required physical stamina and vigor. *Id.* Criminal investigations also frequently require working for long periods of time without a break, being on-call 24 hours a day, and carrying weapons. *Id.* For these reasons, the Board in *Hobbs* found that employees who performed noncriminal investigations, which generally do not share those characteristics, were not entitled to LEO status. *Id.* The employee in *Hobbs*, a Bureau of Alcohol, Tobacco, and Firearms Special Inspector, was not required to maintain a particular level of physical fitness, work frequent overtime, be on-call 24 hours a day, carry a weapon, maintain proficiency in the use of a weapon, give Miranda warnings, or have contacts with known or suspected criminals. *Id.* In contrast, the appellant here often works overtime, is on-call, and interviews suspects. He carries a weapon at times, although he is not generally authorized to do so, and gives Miranda warnings in conjunction with a Special Agent. We find it particularly noteworthy that the appellant participates in interviews with suspects to compare their statements with the physical evidence. IAF, Tab.4, Subtab F at 3-4, Subtab F15, Subtab F29.

The record does not indicate whether the appellant is required to maintain any particular level of physical fitness or proficiency in using a weapon. The hazardous nature of his position is the result of his responsibility for handling explosives as much as his contact with the criminal element. *See Ferrier [supra]* (factors that distinguish criminal investigation from non-criminal investigation include unusual physical hazards for the investigator arising from frequent contacts with criminals and suspected criminals). In this regard, however, the criminal aspect of his contact with explosives adds to the inherent dangers of working with explosives. On balance, we find that the appellant's position shares more characteristics in common with the Fish and Wildlife Service Police Officer position at issue in

Ferrier and the Customs Inspector and Customs Patrol Officer positions at issue in *Sauser*, in which the Board found that the employees were entitled to LEO status, than with the Special Inspector position at issue in *Hobbs* in which the Board affirmed the agency's denial of LEO service credit.

The agency also argues on petition for review that, to the extent that the appellant performs duties of an LEO, they are not his primary duties. PFRF, Tab I at 12-15. Primary duties are defined as those that

(1)(i) Are paramount in influence or weight; that is, constitute the basic reasons for the existence of the position;

(ii) Occupy a substantial portion of the individuals working time over a typical work cycle; and

(iii) Are assigned on a regular and recurring basis.

5 C.F.R. § 831.902. Duties of an emergency, incidental, or temporary nature are not primary even if they consume a substantial amount of time. Generally, if an employee spends an average of at least 50 percent of his time performing a duty or group of duties, they are his primary duties. *Id.*

The appellant's position includes duties that are not LEO duties. He conducts training in explosives, prepares and reviews responses to requests for classification of explosives, incendiary devices or materials, and propellant and explosive industrial tools and devices, and provides technical support for the agency's regulatory activities. IAF, Tab 4, Subtab F2. However, nothing in the record suggests that these non-LEO duties are paramount and constitute the basic reasons for the existence of the position rather than his criminal investigative duties. Likewise, the record shows that the appellant's criminal investigative duties are not emergency, incidental, or temporary.

The agency on petition for review argues that the appellant's primary work is the preparation of determination statements, in which he reports his conclusion as to whether a particular device is illegal.

PFRF, Tab 1 at 13. According to the agency, this is not criminal investigative work. However, on reviewing the documents that the appellant submitted below regarding these determinations and the work they entail, we conclude that they are in many instances part of criminal investigations. The determination that the Agency cites as supporting its argument shows, rather, that the appellant took part in a criminal investigation. In that incident, an individual found what appeared to be an explosive device in a rental storage facility and called the local police who contacted the agency. An Assistant United States Attorney advised the agency's Special Agent Boland that the suspect, the tenant of the storage facility, should only be arrested if the items in question constituted a destructive device. The appellant and a co-worker were called to the scene where they photographed, x-rayed, and remotely disassembled the items. After transporting them to Salt Lake City, they examined the device and determined that it had the characteristics of a warning or intimidation device but contained no explosives and was not a destructive device. They further determined that the other items were explosives and noted that storing them within 350 feet of a daycare facility was illegal. In a caption under one of the photographs accompanying their report was the opinion that the warning device was used in marijuana fields to intimidate intruders. Marijuana seeds were also found with the explosives and warning device. IAF, Tab 4, Subtab F32. In our view, the report indicates that the appellant's work exhibits a number of the characteristics of a criminal investigation, i.e., collecting and examining evidence to determine whether a crime was committed and the identity of the suspect. A review of the documents and the testimony support a finding that the appellant performs similar duties a substantial portion of his working time. IAF, Tab 4, Subtab F; Volume 4, Testimony of the appellant, James Dower, Paul Snable, John Minichino; I.D. at 3-5.

Thus, we find that the appellant has established his entitlement to LEO service credit.

Order

We ORDER the agency to grant the appellant law enforcement officer retirement credit. The agency must accomplish this action within 20 days of the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of Compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

Notice to the Appellant Regarding Fees

You may be entitled to be reimbursed by the agency for your reasonable attorney fees and costs. To be reimbursed, you must meet the criteria set out at 5 U.S.C. §§ 7701(g) or 1221(g), and 5 C.F.R. § 1201.37(a). If you believe you meet these criteria, you must file a motion for attorney fees WITHIN 35 CALENDAR DAYS OF THE DATE OF THIS DECISION. Your attorney fee motion must be filed with the regional office or field office that issued the initial decision on your appeal.

Notice to the Appellant Regarding Further Review Rights

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals

for the Federal Circuit

717 Madison Place, N.W.

Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

* The administrative judge consolidated this appeal for hearing purposes only with *Caponio v. Department of the Treasury*, MSPB Docket No. SF-0842-95-0460-I-1 (Initial Decision, July 10, 1995), and *Read v. Department of the Treasury*, MSPB Docket No. SF-0842-95-0462-I-1 (Initial Decision, July 12, 1995), which also involved entitlement to LEO service credit. IAF, Tab 5. The administrative judge reversed the agency's decisions in those appeals also and the agency filed petitions for review. The Board consolidated those appeals. We decline to consolidate this appeal with those, however, because those appeals involve interpretation of Federal Employees' Retirement System jurisdictional provisions not relevant to this appeal.